Supreme Court, U.S.
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No. 06-1371

In the Supreme Court of the United States

PETRIT NDRECA, AKA XHAFER GORJA, AND ENGLANTINA NDREU, AKA ELMOZA GORJA, PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed the petition for review of an order of the Board of Immigration Appeals because the petition was not timely filed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 18a-19a) and of the immigration judge (Pet. App. 20a-56a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 2006. A motion for reconsideration was denied on November 7, 2006 (Pet. App. 17a). The petition for a writ of certiorari was filed on February 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are citizens of Albania. In October 2001, the Department of Homeland Security initiated removal proceedings against petitioners, alleging that they were subject to removal under 8 U.S.C. 1182(a)(6)(C)(i), for having sought to procure a visa or admission to the United States by fraud or misrepresentation, and 8 U.S.C. 1182(a)(7)(A)(i), for being immigrants who, at the time of application for admission, were not in possession of a valid visa or other entry document required by statute. Pet. App. 19a-22a.

2. At a hearing before an immigration judge, petitioners conceded their removability but sought asylum, withholding of removal, and relief under the Convention Against Torture. Pet. App. 21a-22a. The immigration judge determined that petitioners' testimony "was not sufficiently detailed, consistent or believable to provide a plausible account of the basis for their fears and, thus, cannot suffice to establish their eligibility for asylum" or other relief. *Id.* at 54a.

Petitioners appealed to the Board of Immigration Appeals (BIA). The BIA concluded that the immigration judge's findings were "supported by the record," and it dismissed the appeal. Pet. App. 19a. The BIA issued its decision on July 12, 2006.*

3. Under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, a petition for judicial review "must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1). Federal Rule of Appellate Procedure 25(a)(2)(A) provides that "filing is

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* As reproduced in the appendix to the petition for a writ of certiorari, the BIA's order bears the date "July 12, 2003," Pet. App. 18a, but the actual date is July 12, 2006. *Id.* at 4a.

not timely unless the clerk receives the papers within the time fixed for filing."

In petitioners' case, the 30-day period for receipt of a petition for review expired on August 11, 2006. That day, petitioners sent a petition for review to the Eleventh Circuit clerk's office by Federal Express. Pet. 5; Pet. App. 16a. The petition for review was received and date-stamped filed on Monday, August 14. Thereafter, the court of appeals dismissed the petition for lack of jurisdiction, finding it untimely under Section 1252(b)(1). *Id.* at 1a.

ARGUMENT

Petitioners argue (Pet. 19-25) that the court of appeals should have exercised jurisdiction over their untimely petition for review of the BIA's order. That claim lacks merit. The court of appeals properly dismissed the petition for lack of jurisdiction because it was not timely filed. The decision below does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. To invoke the jurisdiction of a court of appeals, an alien must file a petition for review "not later than 30 days" after the final order of the Board of Immigration Appeals. 8 U.S.C. 1252(b)(1). This Court has held that court of appeals "lack[s] jurisdiction to review" a BIA order if the petition for review is not filed within the statutory time limit. *Stone* v. *INS*, 514 U.S. 386, 406 (1995); see *Bowles* v. *Russell*, 127 S. Ct. 2360, 2364 (2007) (reaffirming the "longstanding treatment of statutory time limits for taking an appeal as jurisdictional"). Petitioners do not dispute that their petition for review was not filed within the time specified by Sec-

tion 1252(b)(1). Accordingly, the court of appeals correctly determined that it lacked jurisdiction.

2. Petitioners suggest (Pet. 23-24) that the decision below creates a circuit conflict with the Ninth Circuit, because the latter court "would have equitably tolled the Petitioners' deadline." Petitioners rely (Pet. 24) on the Ninth Circuit's decision in *Iturribarria* v. *INS*, 321 F.3d 889, 897-898 (2003), but that case involved equitable tolling of the time limit for filing a motion to reopen in *administrative* proceedings, not the statutory 30-day period for filing a petition for review in a court of appeals, which this Court held in *Stone* imposes a *jurisdictional* requirement. Under *Bowles*, such a jurisdictional limitation is not subject to equitable tolling. See *Bowles*, 127 S. Ct. at 2366 ("[T]his Court has no authority to create equitable exceptions to jurisdictional requirements."). In any event, counsel's mistaken failure to meet a filing deadline is not a basis for tolling. See *Lawrence* v. *Florida*, 127 S. Ct. 1079, 1085 (2007) ("Attorney miscalculation is simply not sufficient to warrant equitable tolling.").

3. Petitioners had the assistance of counsel in their administrative removal proceedings, and they do not contend that counsel's representation in those proceedings was inadequate. Petitioners do contend (Pet. 19-25) that their attorney's failure to file a timely petition for review constituted ineffective assistance of counsel and violated the Due Process Clause. That argument lacks merit. This Court has held that the ineffectiveness of a litigant's attorney cannot be the basis of a constitutional claim unless the litigant has a constitutional right to appointed counsel. See *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991); *Wainwright* v. *Torna*, 455 U.S. 586, 587-588 (1982) (per curiam). Petitioners cite no author-

ity for the proposition that there is a constitutional right to appointed counsel in judicial review of immigration proceedings.

Instead, petitioners rely (Pet. 20-21) on *Dearinger ex rel. Volkova* v. *Reno*, 232 F.3d 1042 (9th Cir. 2000), which, in their view, conflicts with the decision below. In *Dearinger*, an alien's attorney filed a petition for review of a BIA decision one day after the deadline for filing had expired, and the petition for review was dismissed as untimely. *Id.* at 1044. The alien's next friends subsequently filed a petition for a writ of habeas corpus in district court, and that court directed the government to re-enter the order of removal to afford the alien another opportunity to file a timely petition for review. *Ibid.* The Ninth Circuit affirmed the district court's exercise of habeas jurisdiction and its grant of relief, holding that counsel's error constituted ineffective assistance of counsel and denied the alien due process. See *id.* at 1045-1046.

Contrary to petitioners' suggestion, *Dearinger* does not conflict with the decision below because it did not hold that a court of appeals may exercise jurisdiction over an untimely petition for review if the untimeliness was due to an attorney's error. Instead, *Dearinger* held that an alien could seek habeas relief from a district court. Petitioners have not done so here. In any event, *Dearinger* has been superseded by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, which provides that the district courts lack habeas jurisdiction to review any question of fact or law regarding any proceeding brought to remove an alien. See *id.* § 106(a)(1) and (2), 119 Stat. 310-311.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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